

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Claude M. Stern (SBN 96737)

2 Michael D. Powell (SBN 202850)

555 Twin Dolphin Dr., 5th Floor

3 Redwood Shores, CA 94065

Tel. 650-801-5000

4 Fax 650-801-5100

5 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Minyao Wang (admitted *pro hac vice*)

6 51 Madison Ave., 22nd Floor

New York, NY 10010

7 Tel. 212-849-7000

8 Fax 212-849-7100

9 Attorneys for Defendants

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

13 Koninklijke Philips N.V. and Philips Lumileds
14 Lighting Company LLC,

15 Plaintiff,

16 vs.

17 Elec-Tech International Co., Ltd., Elec-Tech
18 International (H.K.) Co., Ltd., Wuhu Elec-
19 Tech Photoelectric Technology Co., Ltd., ETI
20 Yangzhou Photovoltaic Technology Co., Ltd.,
21 Dalian Deheo Photovoltaic Technology Co.,
22 Ltd., Shenzhen Retop LED Display Co., Ltd.,
23 ETI Solid State Lighting Inc., ETI LED
Solutions Inc., Donglei Wang, Eva Chan, and
Gangyi Chen,

Defendants.

CASE NO. 5:14-CV-02737-BLF

**DEFENDANTS ELEC-TECH
INTERNATIONAL CO., LTD. AND
ELEC-TECH INTERNATIONAL (H.K.)
CO., LTD.'S NOTICE OF MOTION AND
MOTION FOR CIVIL CONTEMPT
AND/OR FOR SANCTIONS AGAINST
PLAINTIFFS AND REED SMITH LLP
FOR VIOLATIONS OF THE
PARTIES' AGREED PROTECTIVE
ORDER**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
I. PROCEDURAL AND FACTUAL HISTORY.....	3
A. Events Leading Up To The Dismissal Of The Federal Complaint	3
B. The Agreed Protective Order	4
C. The Filing Of The State Complaint.....	5
II. ARGUMENT	9
A. Applicable Legal Standard	9
B. The Court Should Find Plaintiffs And Reed Smith In Contempt	10
C. The Court Should Order Plaintiffs To Pay For Losses Incurred By Moving Defendants As A Result Of The Contempt, Order Plaintiffs To Refile An Amended State Complaint And Preclude Plaintiffs From Using Defendants' Confidential Information Obtained In This Proceeding For Any Purpose.	13
III. CONCLUSION	15

TABLE OF AUTHORITIES**Page****Cases**

<i>Allia v. Target Corp., No. CIVA07-4130 NLHAMD,</i> 2010 WL 1050043 (D.N.J. Mar. 17, 2010)	11
<i>Aloe Vera of America, Inc. v. US,</i> 376 F. 3d 960 (9th Cir. 2004)	15
<i>Bradford Technologies, Inc. v. NCV Software.com,</i> 2013 WL 75772 (N.D. Cal. Jan. 4, 2013)	14
<i>Cadence Pharm., Inc. v. Fresenius Kabi USA, LLC,</i> No. 13-CV-00139 DMS MDD, 2014 WL 3341068 (S.D. Cal. July 8, 2014)	14
<i>Chambers v. NASCO, Inc.,</i> 501 U.S. 32 (1991)	15
<i>In re Crystal Palace Gambling Hall,</i> 817 F.2d 1361 (9th Cir. 1987)	13
<i>In re Dual-deck Video Cassette Recorder Antitrust Litigation,</i> 10 F.3d 693 (9th Cir. 1993)	9, 10, 13
<i>Fink v. Gomez,</i> 239 F.3d 989 (9th Cir. 2001)	9
<i>F.T.C. v. Affordable Media,</i> 179 F.3d 1228 (9th Cir. 1999)	9
<i>In re Grand Jury Subpoena,</i> 646 F.3d 159 (4th Cir. 2011)	13
<i>In re Grand Jury Subpoenas,</i> 627 F.3d 1143 (9th Cir. 2010)	13
<i>Henderson v. City and County of San Francisco,</i> 2006 WL 3507944 (N.D. Cal. 2006)	15
<i>Info. Res., Inc. v. Dun & Bradstreet Corp.,</i> 999 F. Supp. 591 (S.D.N.Y. 1998)	13
<i>On Command Video Corp. v. Lodgenet Entertainment Corp.,</i> 976 F. Supp. 917 (N.D. Cal. 1997)	9, 10, 11
<i>In Re Pacific Pictures Corp.,</i> 679 F.3d 1121 (9th Cir. 2012)	12
<i>Sperry Rand Corp. v. Rothlein,</i> 288 F.2d 245 (2d Cir. 1961)	14

Statutes and Rules

Cal. Civ. Proc. Code § 2019.210.....	3, 4
Fed. R. Civ. P. 26	3
Fed. R. Civ. P. 37	9, 14

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Elec-Tech International Co., Ltd. (“ETI”) and Elec-Tech International (H.K.) Co., Ltd (together with ETI, “Moving Defendants”) will and hereby do move the Court for an order issuing civil contempt sanctions against Plaintiffs Koninklijke Philips N.V. and Philips Lumileds Lighting Company LLC (together “Plaintiffs”) and their counsel Reed Smith LLP (“Reed Smith”) for violating the Northern District of California’s Agreed Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets promulgated by the United States District Court for the Northern District of California (the “Agreed Protective Order”), by which the parties expressly agreed to abide.

This Motion is based on this Notice of Motion, the supporting Memorandum of Points and Authorities, the pleadings and documents on record in this matter, and such other written or oral evidence and argument as may be presented at or before the time this motion is deemed submitted by the Court.

INTRODUCTION

Plaintiffs originally brought suit against Elec-Tech International Co., Ltd., Elec-Tech International (H.K.) Co., Ltd., Wuhu Elec-Tech Photoelectric Technology Co., Ltd., ETI Yangzhou Photovoltaic Technology Co., Ltd., Dalian Deheo Photovoltaic Technology Co., Ltd., Shenzhen Retop LED Display Co., Ltd., ETI Solid State Lighting Inc., ETI LED Solutions Inc., Donglei Wang, Eva Chan, and Gangyi Chen (collectively, “Defendants”) in this Court alleging misappropriation of trade secrets and other related claims. Dkt. No. 1. All of Plaintiffs’ claims were dismissed by this Court on March 20, 2015. Dkt. No. 122. Four days later, on March 24, 2015, Plaintiffs filed a new complaint in California Superior Court for the County of Santa Clara (the “State Court Action”) against Defendants other than Shenzhen Retop LED Display Co., Ltd. and ETI LED Solutions Inc.¹ Defendants’ counsel were unable to obtain a copy of Plaintiffs’

¹ The new state action is numbered 1-15-CV-278566 in the Superior Court for the County of Santa Clara.

1 State Court Action complaint (the “State Complaint”) until April 1, 2015.² Declaration of
2 Michael D. Powell (“Powell Declaration”), Ex. A.

3 A review of the State Complaint led Moving Defendants to conclude that Plaintiffs had
4 impermissibly utilized and relied upon certain documents produced in this action by Moving
5 Defendants in preparing the State Complaint—documents that had been produced to Plaintiffs
6 under the Agreed Protective Order and designated as highly confidential. The Agreed Protective
7 Order prohibits Plaintiffs from using those documents for anything other than prosecuting this
8 (now terminated) case before this Court; it further prohibits Reed Smith from sharing such
9 documents with any other persons or entities (other than qualified retained experts and court
10 personnel), including even Plaintiffs.

11 On April 2, 2015, Defendants’ counsel informed Reed Smith of what appeared to be
12 violations by Plaintiffs and Reed Smith of the Agreed Protective Order. Reed Smith denied any
13 improper use of Moving Defendants’ designated discovery materials and confidential information,
14 but nonetheless subsequently agreed as an interim measure to retract the State Complaint from the
15 public record and replace it with a redacted version, and the parties so stipulated in the Superior
16 Court on May 15, 2015. The redacted State Complaint is attached as Exhibit B to the Powell
17 Declaration. At the time, Defendants reserved their rights to seek sanctions for violations of the
18 Agreed Protective Order. Thus, this Motion seeks monetary and other sanctions for Plaintiffs’
19 disclosure and use of Defendants’ confidential information and/or an order to show cause as to
20 why Plaintiffs and/or Reed Smith should not be held in contempt.

21 Suspiciously, while the parties were discussing Plaintiffs’ improper use of Defendants’
22 confidential information in preparing the State Complaint, Plaintiffs provided notice, on April 23,
23 2015, to Defendants that the United States Department of Justice (“DOJ”) had issued grand jury
24 subpoenas calling for the production of all documents produced by Defendants to Plaintiffs in this
25

26 ² Between the March 24, 2015 filing date of the State Court Action and April 1, 2015,
27 Defendants twice attempted to obtain a copy of the State Complaint by sending personnel to the
28 Superior Court courthouse in downtown San Jose, California, where the court clerks indicated that
the State Complaint was not yet available for copying or viewing. Subsequently, Reed Smith
emailed a copy of the State Complaint to Defendants’ counsel.

1 case. Shortly thereafter, on May 1, 2015, Plaintiffs unilaterally raised the issue of when and
 2 whether Plaintiffs would be required to destroy documents under the Agreed Protective Order, and
 3 claimed that Plaintiffs were subject to potentially conflicting document preservation obligations
 4 under the subpoenas and the destruction obligations under the Agreed Protective Order. Tellingly,
 5 the required date of response for the grand jury subpoenas was May 19, 2015—the very same day
 6 that Plaintiffs evidently believed that it could be subject to document destruction obligations. Dkt.
 7 No. 137, at 2-3 (May 11, 2015 administrative motion). The timing of Plaintiffs’ concerns and the
 8 coincidence of the May 19 date suggest (if not prove) that Plaintiffs are cooperating with the DOJ
 9 in connection with a criminal investigation into one or more Defendants. Consequently,
 10 Plaintiffs’ misuse of the Moving Defendants’ designated discovery materials and confidential
 11 information is highly prejudicial and should not go unpunished.

12 **I. PROCEDURAL AND FACTUAL HISTORY**

13 **A. Events Leading Up To The Dismissal Of The Federal Complaint**

14 On June 12, 2014, Plaintiffs Koninklijke Philips N.V. and Philips Lumileds Lighting
 15 Company LLC, represented by Reed Smith, filed their Complaint (Dkt. No. 1) against Defendants.
 16 On October 1, 2014, Defendants filed three separate motions to dismiss (Dkt. Nos. 34, 35, and 36)
 17 for, respectively, lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to
 18 state a claim upon which relief could be granted.

19 On October 23, 2014, after the Rule 26(f) conference, the parties served numerous sets of
 20 discovery on each other—Plaintiffs served separate “jurisdictional” discovery requests for
 21 documents on each defendant, and ETI served document requests, interrogatories, and requests for
 22 inspection on Plaintiffs. On November 5, 2014, Plaintiffs served additional discovery requests on
 23 ETI. The parties soon entered into multiple rounds of meet-and-confers on multiple issues
 24 preventing the parties from producing discovery, including the scope of the parties’ respective
 25 discovery requests and Plaintiffs’ failure to adequately disclose the trade secrets that Defendants
 26 allegedly misappropriated as required under California Civil Procedure Code Section 2019.210.
 27 ETI also subpoenaed several third parties identified by Plaintiffs in their initial disclosures under
 28 Fed. R. Civ. P. 26.

1 The parties remained at an impasse and on December 22, 2014, the parties filed a
 2 discovery dispute joint report pursuant to the rules of Judge Howard Lloyd, the magistrate judge
 3 assigned to this case. *See* Dkt. No. 66. That same day, Defendants moved for leave to file a
 4 motion for a protective order barring Plaintiffs from taking any discovery until the Section
 5 2019.210 issue had been resolved. *See* Dkt. No. 68. In a good faith attempt to move the
 6 discovery process forward, Defendants agreed to make limited jurisdictional discovery available to
 7 Plaintiffs, without waiving their rights under California Civil Procedure Code Section 2019.210.
 8 Accordingly, 5,880 pages of jurisdictional discovery materials were produced by Defendants to
 9 Plaintiffs, many of which were designated as HIGHLY CONFIDENTIAL – ATTORNEYS’
 10 EYES ONLY.

11 Numerous discovery disputes continued to crop up between the parties, which led to the
 12 filing of second, third, fourth, and fifth joint reports. *See* Dkt. Nos. 78, 81, 106, and 107. In
 13 particular, the parties’ fifth discovery joint report (“Joint Report No. 5”) focused exclusively on
 14 the collusive and cooperative relationship between Plaintiffs, their counsel, and the DOJ. In Joint
 15 Report No. 5, ETI argued that Plaintiffs’ production of certain documents to the DOJ and the
 16 Federal Bureau of Investigation operated as a waiver of privilege with respect to those documents.
 17 Judge Lloyd did not adjudicate any of the parties’ discovery disputes.

18 Briefing on Defendants’ motions to dismiss closed on February 23, 2015. The Court
 19 heard arguments on Defendants’ motions on March 12, 2015. In an Order issued on March 20,
 20 2015, the Court found that Plaintiffs had failed to state a claim with respect to Plaintiffs’ cause of
 21 action under the federal Computer Fraud and Abuse Act. *See* Dkt. No. 122, at 9-10. With
 22 Plaintiffs’ only federal cause of action dismissed and with Plaintiffs’ voluntary withdrawal of their
 23 assertion of diversity jurisdiction, *see id.* at 2, the Court declined to exercise supplemental
 24 jurisdiction over Plaintiffs’ remaining state-law claims and dismissed this action. *Id.* at 10.

25 **B. The Agreed Protective Order**

26 The parties and their counsel agreed to abide by the terms of the Agreed Protective Order.
 27 *See* Docket No. 56 at 14. The Agreed Protective Order expressly notes at the outset that the
 28 parties might exchange confidential, proprietary, or private information that may not be used “for

any purpose other than prosecuting *this* litigation.” ¶ 1 (emphasis added). The Agreed Protective Order permits parties and their counsel to “use Protected Material” only in connection with “*this* case.” ¶ 7.1 (“A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection *with this case only* for prosecuting, defending, or attempting to settle *this litigation*”) (emphasis added). Accordingly, Plaintiffs and Reed Smith are not permitted to utilize any Protected Material in connection with the commencement or prosecution of a new action in any court. The Agreed Protective Order further limits disclosure of Protected Materials to specific categories of individuals and entities, depending upon the level of designation, ¶¶ 7.2, 7.3. HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY is the highest form of protection available under the Agreed Protective Order and distribution of such documents is limited to outside counsel, outside experts and certain court personnel. ¶ 7.3. Reed Smith is not permitted to disclose HIGHLY CONFIDENTIAL materials even to Plaintiffs, ¶ 7.3, let alone disseminate them in a publicly accessible document.

C. The Filing Of The State Complaint

Four days after the dismissal of the federal complaint, Plaintiffs, again represented by Reed Smith, filed a civil complaint in state court against the Defendants (except for Shenzhen Retop LED Display Co., Ltd, and ETI LED Solutions Inc. which were not named as a defendant in the new state complaint). In preparing the State Complaint, Reed Smith disregarded the express terms of the Agreed Protective Order that precludes it from using confidential information acquired in this litigation for another case.

Examples of the violations of the Agreed Protective Order committed by Reed Smith and Plaintiffs in the State Complaint include, without limitations, the following:

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED] This allegation is derived at least in part from, without limitations, Exhibits 1, 3, 6, 7, 12, 15, 16, 17, 18, 19, 20, 23, 24, 28, 31, 39, 41, 44, 45 and

1 50 to the Declaration of Lawrence E. James, Jr. in Support of Opposition to Defendants’
 2 Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Lack
 3 of Personal Jurisdiction, Dkt. Nos. 88-7 & 91-7 (the “James Declaration”), all of which
 4 were designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY. The
 5 aforementioned exhibits are attached to the Powell Declaration as Exhibits C, D, F, G, K,
 6 N, O, P, Q, R, S, T, U, V, W, X, Y, AA, BB, and CC, respectively.

7 • [REDACTED]
 8 [REDACTED] This allegation is derived at
 9 least in part from, without limitations, Exhibits 8, 9, 10, 13, 14, 44, 45, and 50 to the James
 10 Declaration, which were designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
 11 ONLY. The aforementioned exhibits are attached to the Powell Declaration as Exhibits
 12 H, I, J, L, M, AA, BB, and CC, respectively.

13 • [REDACTED]
 14 [REDACTED]
 15 [REDACTED] This allegation is derived at least in part from, without limitations, Exhibits
 16 3 and 7 to the James Declaration. The aforementioned exhibits are attached to the Powell
 17 Declaration as Exhibits D and G, respectively.

18 • [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] This allegation is derived at least in part from, without
 23 limitations, Exhibits 1, 3, 5, 6, 7, 12, 15, 16, 17, 18, 19, 20, 23, 24, 28, 31, 39, and 41 to the
 24 James Declaration, all of which were designated HIGHLY CONFIDENTIAL –
 25 ATTORNEYS’ EYES ONLY. The aforementioned exhibits are attached to the Powell
 26 Declaration as Exhibits C, D, E, F, G, K, N, O, P, Q, R, S, T, U, V, W, X, and Y,
 27 respectively.

1 • [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] This allegation is derived at least in part from, without limitations,
 5 Exhibits 1, 3, 6, 7, 12, 15, 16, 17, 18, 19, 20, 23, 24, 28, 31, 39, 41, 44, 45 and 50 to the
 6 James Declaration, all of which were designated HIGHLY CONFIDENTIAL –
 7 ATTORNEYS’ EYES ONLY. The aforementioned exhibits are attached to the Powell
 8 Declaration as Exhibits C, D, F, G, K, N, O, P, Q, R, S, T, U, V, W, X, Y, AA, BB, and
 9 CC, respectively.

10 • [REDACTED]
 11 [REDACTED] This allegation is derived at least in part from,
 12 without limitations, Exhibits 8, 9, 10, 13, 14, 43, 44, 45, and 50 to the James Declaration,
 13 which were designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.
 14 The aforementioned exhibits are attached to the Powell Declaration as Exhibits H, I, J, L,
 15 M, Z, AA, BB, and CC, respectively.

16 • [REDACTED]
 17 [REDACTED] This allegation is derived at
 18 least in part from, without limitations, Exhibits 8, 9, 10, 13, 14, 44, 45, and 50 to the James
 19 Declaration, which were designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
 20 ONLY. The aforementioned exhibits are attached to the Powell Declaration as Exhibits
 21 H, I, J, L, M, AA, BB, and CC respectively.

22 • [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 This allegation is derived at least in part from, without limitations, Exhibit 50 to the James
 26 Declaration, which was designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
 27 ONLY. The aforementioned exhibit is attached to the Powell Declaration as Exhibit CC.
 28

1 • [REDACTED]
2 [REDACTED] This allegation is derived at
3 least in part from, without limitations, Exhibit 50 to the James Declaration, which was
4 designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY. The
5 aforementioned exhibit is attached to the Powell Declaration as Exhibit CC.

6 • [REDACTED]
7 [REDACTED]
8 [REDACTED] This allegation is derived at least in part from, without
9 limitations, Exhibit 50 to the James Declaration, which was designated HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY. The aforementioned exhibit is
11 attached to the Powell Declaration as Exhibit CC.

12 • [REDACTED]
13 [REDACTED] This allegation is derived at least in part from, without limitations,
14 Exhibit 50 to the James Declaration, which was designated HIGHLY CONFIDENTIAL –
15 ATTORNEYS’ EYES ONLY. The aforementioned exhibit is attached to the Powell
16 Declaration as Exhibit CC.

17 • [REDACTED]
18 [REDACTED] This allegation is derived
19 at least in part from, without limitations, Exhibit 50 to the James Declaration, which was
20 designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY. The
21 aforementioned exhibit is attached to the Powell Declaration as Exhibit CC.

22 • [REDACTED]
23 [REDACTED]
24 [REDACTED] This allegation is derived at least in part from Exhibit 50 to the James
25 Declaration, which was designated HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
26 ONLY. The aforementioned exhibit is attached to the Powell Declaration as Exhibit CC.

Pursuant to a stipulation entered into by the parties in State Action on May 15, 2015 pending the resolution of this dispute, the State Complaint is currently not accessible by the general public.

Counsel to Moving Defendants and counsel to Plaintiffs held a telephonic meet and confer on August 3, 2015 and reached an impasse over the relief sought in this Motion.

II. ARGUMENT

A. Applicable Legal Standard³

It is well-established that “a federal court may levy sanctions under its inherent power.” *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). The Court may impose such sanctions “for bad faith, which includes a broad range of willful improper conduct.” *Id.* at 992. Further, Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure provides, in pertinent part, that: “[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders . . . treating as contempt of court the failure to obey any order.” A court is also required to assess payment of fees and expenses. F.R.C.P. 37(b)(2)(C). Moreover, a “court has the power to adjudge in civil contempt any person who willfully disobeys a specific and definite order requiring him to do or to refrain from doing an act.” *On Command Video Corp. v. Lodgenet Entertainment Corp.*, 976 F.Supp. 917, 922 (N.D. Cal. 1997).

A moving party establishes a prima facie showing of civil contempt by introducing clear and convincing evidence showing that the other party violated a specific and definite order of the court. The contemnor must then establish why compliance was not possible. *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). To succeed on a motion for civil contempt based on a violation of a protective order, it must be established that the responding party (1) “violated the [Protective Order] beyond substantial compliance, and that [(2)] the violation was not based on a good faith and reasonable interpretation of the [Protective Order].” *On Command*, 976 F.Supp. at 922; *see also In re Dual-Deck Video Cassette Recorder Antitrust*

³ If the Court determines that contempt sanctions are not yet appropriate at this stage but would be aided by a submission from Plaintiffs, Defendants request that the Court issue an order to show cause directing that Plaintiffs and Reed Smith to demonstrate why they should not be held in contempt.

1 *Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). Furthermore, where a party violates a court order,
 2 the party may be held in civil contempt whether or not the violation was intentional. *Id.*

3 The *On Command Video* case is instructive. In *On Command Video*, the parties submitted
 4 to the court a stipulated protective order governing the exchange of confidential discovery
 5 materials in the litigation. 976 F.Supp. at 920. Like the Agreed Protective Order here, the
 6 protective order in *On Command Video* provided that “information designated as Confidential
 7 Information shall not be used by the other party for any purpose other than in connection with
 8 preparation of the parties [sic] analysis of issues presented in this litigation.” *Id.* The plaintiff
 9 subsequently used confidential materials produced by the defendant during federal discovery and
 10 subject to the federal protective order as the basis for filing a separate lawsuit against the
 11 defendant in state court. *Id.* The defendant moved for contempt sanctions against the plaintiff.
 12 *Id.* The district court concluded that plaintiff violated the protective order and was in civil
 13 contempt. *Id.* at 921-24.

14 Indeed, in *On Command Video*, the fact that the plaintiff subsequently sought to seal its
 15 subsequently-filed state court complaint against the defendant, which had utilized confidential
 16 information produced by the defendant in the first-filed federal court litigation, was of no
 17 assistance to the plaintiff. The court found that the plaintiff’s “attempts to seal the state court
 18 record and the fact that the state court pleadings did not disclose any [of defendant’s] proprietary
 19 information]” was not a “harmless technical violation.” *Id.* at 922. On the contrary, the parties
 20 agreed to a stipulated protective order that, “as defendant correctly points out, [] prohibits use.”
 21 *Id.* Thus, the court held, “Plaintiff’s use of protected information to file a separate state court
 22 lawsuit—as opposed to this litigation—is tantamount to no compliance [with the stipulated
 23 protective order] at all.” *Id.* This is exactly what Plaintiffs and Reed Smith have done here and
 24 their conduct was “tantamount to no compliance at all” with the Agreed Protective Order.

25 **B. The Court Should Find Plaintiffs And Reed Smith In Contempt**

26 Plaintiffs and Reed Smith’s breach of the Agreed Protective Order, as described above,
 27 warrants the Court finding them in civil contempt. As stated above, the parties agreed to be
 28 bound by the Agreed Protective Order limiting the use and disclosure of confidential information

1 to only this case and further prohibiting counsel from sharing such materials with even their own
 2 clients. Plaintiffs and Reed Smith are bound by the Agreed Protective Order because it was
 3 agreed upon by the parties.

4 Like the plaintiff in *On Command Video*, neither Plaintiffs nor Reed Smith can credibly
 5 argue that their conduct was based on a good faith and reasonable interpretation of the Agreed
 6 Protective Order. *Id.* at 922-23 (noting the language of the protective order left no doubt that use
 7 of discovery materials in a separate action was not permitted). The Agreed Protective Order is
 8 likewise clear as to how and to whom highly confidential materials can be used and/or disclosed.
 9 There can be no debate that Plaintiffs and Reed Smith's use and disclosure of materials designated
 10 as highly confidential in this case went far beyond the parameters of the Agreed Protective Order.
 11 Therefore, the Court should hold Plaintiffs and Reed Smith in civil contempt for violations of the
 12 Agreed Protective Order.

13 Despite the fairly obvious misuse of highly confidential Protected Material produced by
 14 Defendants in violation of the Agreed Protective Order, Plaintiffs and Reed Smith have
 15 nonetheless denied any violation of the Agreed Protective Order and failed to undertake even a
 16 basic investigation into the violations after Moving Defendants registered their concerns with
 17 Reed Smith. Courts do not excuse a party's unexplained failure to investigate breaches of a
 18 protective order. *U.S. ex rel. Johnson v. Golden Gate Nat. Sr. Care, L.L.C.*, No. CIV. 08-1194
 19 DWF/JJK, 2013 WL 1182905, at *5 (D. Minn. Mar. 21, 2013) ("Defendants have made no effort
 20 to explain how that carelessness led to a violation of the Court's Order, the Court finds it difficult
 21 to take this excuse at face value."); *Allia v. Target Corp.*, No. CIVA07-4130 NLHAMD, 2010 WL
 22 1050043, at *14 (D.N.J. Mar. 17, 2010) ("[Plaintiff] cannot explain why, after Target has
 23 repeatedly informed her of her breach during the course of this litigation, through numerous letters,
 24 motions, court conferences, a counterclaim, and a protective order which reserves its right to
 25 prosecute its counterclaim, she believes that she can continue to hold onto, use, and publicly
 26 publish documents that are incontrovertibly confidential and/or privileged.").

27 The unsubstantiated and inadequate explanations proffered by Plaintiffs have only added to
 28 the mystery. For example, in an email attachment sent to counsel to Defendants on May 13, 2015,

1 Reed Smith belatedly asserted “interviews with third party witnesses John Morreale, Greg Crema,
2 Anneli Munkholm, and Michael Craven” as a separate independent source for the highly
3 confidential information that Reed Smith acquired in discovery undertaken in this case and then
4 impermissibly used in the State Complaint. But Reed Smith did not provide any particulars about
5 these purported interviews, including such basic information as to when and where these
6 purported interviews took place, nor did they explain why they were eliciting ETI confidential
7 information from ETI’s former employees. Likewise, there is no explanation as to why Plaintiffs
8 were unable to obtain such information in the earlier interviews they conducted with the same
9 witnesses prior to filing the complaint in this court; yet somehow Plaintiffs were able to learn
10 about the same information “independently” not long after seeing such information in discovery
11 produced by Defendants on a highly confidential basis under the Agreed Protective Order. This
12 sequence of events strains credulity.

13 In addition, on April 21, 2015, the United States Attorney for the Northern District of
14 California issued subpoenas to both Plaintiffs and Reed Smith seeking documents produced by
15 Defendants in this litigation. As Defendants previously explained in a joint report filed with
16 Judge Lloyd, Plaintiffs appeared to have solicited a criminal investigation of Dr. Gangyi Chen and
17 possibly other Defendants. *See* ECF 107 at 1-5. In defiance of the Ninth Circuit’s holding in *In*
18 *Re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) regarding the scope of the common
19 interest doctrine, Plaintiffs refused to produce their communications with the DOJ, including the
20 Federal Bureau of Investigation, regarding one or more Defendants and/or the subject matter of
21 this litigation. This sequence of events has led Defendants to believe that Plaintiffs also, in
22 addition to impermissibly using confidential information in the State Complaint in violation of the
23 Agreed Protective Order, *also* shared such confidential information with federal law enforcement
24 personnel or otherwise encouraged the DOJ to subpoena such information. Notably, the dates
25 noticed for compliance in the grand jury subpoenas is May 19, 2015—the exact same date that
26 Plaintiffs have previously professed as the earliest possible date for their document destruction
27 obligations to trigger under the Agreed Protective Order. *See* Dkt. No. 137, at 2-3. Such
28 conduct, to the extent it occurred, would directly affect the rights of Defendants in this action and

beyond, including but not limited to, the scope of the purported common interest privilege between Plaintiffs and the DOJ that Plaintiffs relied upon in this litigation to withhold documents. *See In re Grand Jury Subpoenas*, 627 F.3d 1143, 1144 (9th Cir. 2010) (noting the potential for federal prosecutors and civil plaintiffs to engage in “collusion”); *In re Grand Jury Subpoena*, 646 F.3d 159, 168 (4th Cir. 2011) (noting that federal prosecutors are not permitted to “improperly collude” with a civil plaintiff to obtain the documents from a civil defendant); *Info. Res., Inc. v. Dun & Bradstreet Corp.*, 999 F. Supp. 591, 593 (S.D.N.Y. 1998) (“[W]aiver results from the voluntary submission of material to a government agency to incite it to attack the informant’s adversary.”).

Finally, if Plaintiffs *did* solicit grand jury subpoenas from the DOJ in order to evade what it believed were appropriate and proper document destruction obligations under the Agreed Protective Order, such behavior, if tolerated, would create an escape route for any party seeking an end run around a protective order issued by a United States District Court. It cannot be that a party may evade its obligations under a protective order by asking a third party to issue a subpoena.

Accordingly, the Court should hold Plaintiffs and Reed Smith in contempt for their violations of the Agreed Protective Order.

C. The Court Should Order Plaintiffs To Pay For Losses Incurred By Moving Defendants As A Result Of The Contempt, Order Plaintiffs To Refile An Amended State Complaint And Preclude Plaintiffs From Using Defendants’ Confidential Information Obtained In This Proceeding For Any Purpose.

The appropriate remedies for Plaintiffs and Reed Smith’s breach of the Agreed Protective Order are to order (1) that Plaintiffs and Reed Smith reimburse Moving Defendants for all legal fees and costs incurred in attempting to remedy and mitigate the damage and prejudice caused by the breach;⁴ (2) that Plaintiffs amend the State Complaint and excise all references to Moving Defendants’ designated discovery materials and confidential information produced to Plaintiffs in this action, and (3) that Plaintiffs, as an evidentiary sanction, be permanently prohibited from

⁴ *See Dual-Deck*, 10 F.3d at 696 (noting that party aggrieved by contemnor is entitled to “‘actual loss’ for injuries resulting from the noncompliance.”) (quoting in part *In re Crystal Palace Gambling Hall*, 817 F.2d 1361, 1366 (9th Cir. 1987))).

1 using, for any purpose (including in any litigation in the State Court Action or any other legal
 2 proceeding), Moving Defendants' designated discovery materials and confidential information
 3 produced to Plaintiffs in the this action and improperly used and/or relied upon in the State
 4 Complaint.

5 The proposed sanctions are proportionate to the seriousness of the violations committed
 6 here and are necessary to deter members of the bar and litigants from violating a protective order.
 7 Modern litigation cannot proceed without protective orders that are trusted by adversaries and can
 8 be effectively implemented. Plaintiffs and Reed Smith's misconduct directly impacts the
 9 integrity of protective orders upon which civil litigation depends. "Strict observation of
 10 protective orders is essential to the sound and just operations of the civil justice system in cases
 11 like this one that require discovery of highly sensitive trade secrets or other confidential
 12 information." *Bradford Technologies, Inc. v. NCV Software.com*, 2013 WL 75772, at *7 (N.D.
 13 Cal. Jan. 4, 2013). Moreover, this Court should prevent Plaintiffs from accruing an unfair
 14 advantage from their impermissible use of designated materials. *Sperry Rand Corp. v. Rothlein*,
 15 288 F.2d 245, 248 (2d Cir. 1961) ("We realize that by enjoining any use of or reference to
 16 information or materials first divulged in the course of *federal* discovery, the district judge was
 17 barring access to this evidence even after resort to such discovery processes as were available in
 18 the *state courts*. However, the broad proscription was necessary to carry out the purpose of the
 19 [federal protective] order lest it otherwise be frustrated") (emphasis added). Plaintiffs should be
 20 subject to the same penalty here for their disregard of the Agreed Protective Order.

21 FRCP 37(b)(2)(C) provides that: "the court shall require the party failing to obey the order
 22 or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees,
 23 caused by the failure, unless the court finds that the failure was substantially justified or that other
 24 circumstances make an award of expenses unjust." *Cadence Pharm., Inc. v. Fresenius Kabi USA*,
 25 *LLC*, No. 13-CV-00139 DMS MDD, 2014 WL 3341068, at *4 (S.D. Cal. July 8, 2014) (awarding
 26 costs and attorneys fees to defendant for investigating the circumstances of plaintiff's breach of
 27 the protective order). Moreover, the Court has the inherent power to order that the party who
 28 violates a court order and his or her attorney to pay the reasonable attorneys' fees and costs of the

1 moving party incurred as a result of the violating party's failure to comply with the court order.
2 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Aloe Vera of America, Inc. v. US*, 376 F. 3d
3 960, 966 (9th Cir. 2004); *see also Henderson v. City and County of San Francisco*, 2006 WL
4 3507944, at *17-18 (N.D.Cal. 2006) (ordering Plaintiff's counsel to pay defense counsel's
5 attorneys fees based on Plaintiff's violations of Protective Order).

6 Here, there is no justification for Plaintiffs and Reed Smith's violations of the Agreed
7 Protective Order. The Agreed Protective Order was agreed to by all parties and their counsel in
8 this case. Reed Smith, as counsel to Plaintiffs, signed the case management conference statement
9 agreeing to abide by the Agreed Protective Order. Moreover, the terms of the Agreed Protective
10 Order are clear. No reasonable person could interpret the terms of the Agreed Protective Order to
11 allow for the disclosure of highly confidential materials in a new case filed in another forum. The
12 violations of the Agreed Protective Order are aggravated by Reed Smith's refusal to accept
13 responsibility for its conduct. Plaintiffs and Reed Smith's actions, as described above, are clear
14 violations of the Agreed Protective Order, and are not justified. The actions at issue seriously
15 undermined the proper functioning of and public trust in the litigation system. Moving
16 Defendants have had to expend a significant amount of time and resources to enforce the Agreed
17 Protective Order. Moving Defendants, therefore, respectfully request that the Court impose the
18 requested sanctions against Plaintiffs and Reed Smith.

19 III. CONCLUSION

20 For the reasons set forth above, Defendants respectfully request that the Court grant
21 Defendants' motion for civil contempt and for sanctions against Plaintiffs Koninklijke Philips N.V.
22 and Philips Lumileds Lighting Company LLC, and Reed Smith LLP. Defendants respectfully
23 request that the Court issue an order:

- 24 (1) finding that Plaintiffs and Reed Smith violated the Agreed Protective Order;
- 25 (2) holding Plaintiffs and Reed Smith LLP in civil contempt of court for violations of
26 the Agreed Protective Order;
- 27 (3) directing that Plaintiffs amend their complaint docketed in Case No. 1-15-CV-
28 278566 in the Superior Court for the County of Santa Clara, California, and excise all references

1 to Moving Defendants' designated discovery materials and confidential information produced to
2 Plaintiffs in this action;

3 (4) directing that Plaintiffs and Reed Smith reimburse Moving Defendants' reasonable
4 attorneys' fees and costs incurred as a result of Plaintiffs and Reed Smith's violations of the
5 Agreed Protective Order (according to proof following the finding of contempt);

6 (5) prohibiting permanently, as an evidentiary sanction, Plaintiffs' use of, for any
7 purpose (including in any litigation in the State Court Action or any other legal proceeding),
8 Moving Defendants' designated discovery materials and confidential information produced to
9 Plaintiffs in this action and improperly used and/or relied upon in the State Complaint, including,
10 without limitation, Exhibits 1, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 28, 31,
11 39, 41, 43, 44, 45, and 50 to Declaration of Lawrence E. James, Jr. in Support of Opposition to
12 Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for
13 Lack of Personal Jurisdiction, Dkt. Nos. 88-7 & 91-7 and any other designated discovery materials
14 produced in this action from which the improperly disclosed information could have been derived;
15 and

16 (6) ordering any other sanctions that the Court deems just and proper.

17 DATED: August 7, 2015

18 QUINN EMANUEL URQUHART & SULLIVAN, LLP

19 By: /s/ Michael D. Powell

20 Claude M. Stern
21 Michael D. Powell
22 Minyao Wang (admitted *pro hac vice*)
23 Attorneys for Defendants
24
25
26
27
28